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ABSTRACT

This paper addresses recurring ethical questions faced by college and university attorneys concerning who is the client, representation of individual and institutional defendants, and the witness-advocate rule. It also provides an overview of ethical considerations which can arise when the college/university attorney participates in the investigation of possible employee/student misconduct and in campus adjudicatory hearings. The college/university can act only through its duly authorized constituents, which the attorney usually has no difficulty identifying. Board by-laws, institutional policies and delegations of authority define responsibilities and define who speaks and acts for the institution. When the university and faculty/staff/administrators in both their official and individual capacities are named as defendants, responding on behalf of each named client appears to be the most appropriate action unless there is no difference in the facts and legal theories of defense available to each defendant. Lawyers generally cannot act as advocates at trials in which they are likely to be necessary witnesses. The paper includes two hypothetical cases that present additional questions of ethics for college/university attorneys. (Contains reference footnotes.) (MAH)

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ETHICS ISSUES FOR THE COLLEGE/UNIVERSITY LAWYER

NACUA ANNUAL CONFERENCE (SAN ANTONIO)
June 16-19, 1996

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Introduction

The purpose of this outline is twofold: (1) to address recurring ethical questions concerning who is the client, representation of individual and institutional defendants, and the witness-advocate rule; and, (2) to provide a general overview of ethical considerations which can arise when the college/university attorney participates in the investigation of possible employee/student misconduct and in campus adjudicatory hearings.

I. RECURRING ETHICAL QUESTIONS

NACUA attorneys have discussed most of the issues addressed in this outline many times in the past and will continue to discuss them in the future. There is little new substantive law to add, but there is continued value in the discussion because there may be new approaches or perspectives on age-old questions which will generate new and creative answers. Previous annual conferences and CLE programs have provided a wealth of resource materials for the NACUA attorney to consult when ethical questions arise.[1]

A. The Applicable Ethical Standards

Several canons and rules are pertinent to the discussion of ethical considerations facing a college/university attorney as he or she ponders the recurring questions of who is the client, multiple-party representation, the investigation of possible employee misconduct or participation in campus adjudicatory hearings. Canon 4 of the Model Code ("A Lawyer Should Preserve the Confidences and Secrets of a Client") and Canon 5 of the Model Code ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"), as well as the disciplinary rules contained therein, are the foundation upon which the ethical considerations are built. Likewise Model Rules 1.6 ("Confidentiality of Information"), 1.7 ("Conflict of Interest"), 1.13 ("Organization as a Client"), 1.16 ("Declining or

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[1]For excellent discussions of these issues, see Robert M. O'Neil, "The Lawyer and the Client in the Campus Setting: Who Is the Client, What Does the Client Expect and How May the Attorney Respond?" NACUA Ethics Project (March 1992); Stephen S. Dunham, "Case Studies of Wrongdoing on Campus: Ethics and the Lawyer's Role," NACUA Annual Conference 1992; Stephen S. Dunham, "Ethical Issues for the University Attorney," NACUA Annual Conference 1991; Christine Helwick, "The Role of Counsel in Campus Adjudication," NACUA Annual Conference 1991; and Pamela J. Bernard, "Hard Choices, Awkward Situations, Conflicts in Ethics: A Workshop on Lawyering and Good Judgment," NACUA Annual Conference 1988.

Terminating Representation"), 3.7 ("Lawyer as a Witness"), 4.3 ("Dealing with Unrepresented Person") and the accompanying comments provide a framework which a college/university attorney should use in analyzing his or her role in campus representation.

B. Determining Who is the Client and Who is the Duly Authorized Constituent

The first step in addressing any ethical issue is determining who is the client. This answer is relatively easy because Model Rule 1.13(a) tells us that the institution is the client: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

Since the college/university can act only through its duly authorized constituents, the attorney must then determine who is the "duly authorized constituent" for the particular matter at hand. The decentralized nature of an academic institution permits various employees to act for the entity in different situations.

Most of the time, the attorney has no difficulty identifying the person or group acting as the "duly authorized constituent" and who is to be treated as the client in a given situation. Board by-laws, institutional policies and delegations of authority define responsibilities and define who speaks and acts for the institution.

C. Problems with Representing Both the Institution and Individual Defendants

In many situations, the university will be named as a defendant and so will faculty/staff/administrators in both their official and individual capacities. The facts upon which the litigation is based will be the same. If an internal investigation has taken place and the institution has determined that the faculty/staff/ administrator has been guilty of no wrongful conduct, problems are not likely to arise. Joint representation is appropriate in most of these cases with full disclosure to and consent from all parties. If, however, the parties involved may take different legal positions of defense during litigation, different positions concerning settlement, or a significantly different interpretation of the facts, multiple representation is not advisable or even permitted even though significant financial savings can be realized by the multiple representation.

On a very practical note, how does the attorney representing both the institution and named defendants file pleadings--one pleading for all defendants or one for the institution and one for each of the named defendants? What does the attorney do when moving for summary judgment--one motion for all defendants or one for each defendant? The same question arises as to the supporting brief. Since Ethical Consideration 5-15 requires that the attorney exercise "independent judgment on behalf of each client," and Ethical Consideration 7-1 imposes a duty of zealous representation, it seems that responding on behalf of each named client, as well as the institution, is the most appropriate path to take unless there is absolutely no difference in the facts and legal theories of defense available to each defendant.

D. Problems Which Arise When the Attorney Is Needed as Both a Witness and Advocate

Under Rule 3.7(a) of the Model Rules, a lawyer generally cannot act as an advocate at a trial in which he or she is likely to be a necessary witness. The comment to this rule points out that combining

the roles of advocate and witness can prejudice the opposing party and involve a conflict of interest between the lawyer and his or her client.

Rule 3.7(b), however, permits a lawyer to act as an advocate at trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless prohibited under Rule 1.7 [conflict of interest] or Rule 1.9 [conflict of interest: former client]. This rule offers one way of resolving the advocate-witness problem for an institution with a large legal office--creation of a "Chinese Wall." A Chinese Wall is an artificial barrier on information, verbal and written, between two lawyers of the same firm or office. In order to use successfully a Chinese Wall, the office must implement the wall early and must not have any breach in the wall, either with verbal or written communications coming into or going out of the office.[2]

II. ROLE OF ATTORNEY IN INVESTIGATION OF POSSIBLE EMPLOYEE/STUDENT MISCONDUCT AND PARTICIPATION IN CAMPUS ADJUDICATORY HEARINGS

The college/university attorney serves his or her institution in a myriad of roles--as legal advisor, investigator of possible employee/student misconduct, investigator gathering facts with which to respond to an external investigation or audit, prosecutor or counsel for campus adjudicatory hearings, advisor to the president and university committees, and as legal counsel representing the institution before administrative agencies and in court. None of these roles present more ethical dilemmas for the college/university attorney than do those of investigator of alleged misconduct and participant in campus adjudicatory hearings.

(A) Role of Investigator

Probably no person on a college campus is better trained to investigate situations involving possible misconduct than is the institution's attorney. In addition to having knowledge of the law and what is and is not permissible conduct, the attorney is accustomed to assimilating vast amounts of documentary evidence, being thorough in examination of witnesses, and being discrete.

Because of these strengths, the college/university attorney is frequently asked to conduct internal investigations of possible wrongdoing and to be in charge of investigations in response to external complaints or audits. During such investigations, issues involving confidentiality and conflicts of interest can arise, such as the following:

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[2]For good discussions and citations pertaining to Chinese Walls, see Christine Helwick, "The Role of Counsel in Campus Adjudication," NACUA Annual Conference 1991; Pamela J. Bernard, "Hard Choices, Awkward Situations, Conflicts in Ethics: A Workshop on Lawyering and Good Judgment," NACUA Annual Conference 1988; and Comment, "The Chinese Wall Defense to Law-Firm Disqualification," 128 U. Pa. L. Rev. 677 (1980).

Interviews with coaches and student-athletes in response to NCAA allegations of recruiting violations;

Questioning of faculty member as result of scientific misconduct charge;

Discussions with research professor and contracts and grants officer in connection with investigation of university's use of sponsored research funds;

Interview with professor in course of investigating sexual harassment charge filed by student.

In situations such as these, the investigating attorney should:

Disclose immediately to the person being interviewed that he or she represents the institution even if it means that the individual being questioned may not be as candid and forthcoming in providing information which would be of help in defending the institution;

Advise the person being questioned that he or she has the right to retain an attorney if desired;

Never permit the person being questioned to tell him or her something "in all confidence" or present a "hypothetical" situation for response;

Share the results of the investigation with other campus constituents unless prepared to waive the attorney-client privilege.

(B) Role of Participant in Campus Adjudicatory Hearings

1. Prosecutor in Disciplinary Hearing

At some institutions, the attorney presents the case against the employee or student charged in a disciplinary hearing. Should this procedure be used, the same attorney should not advise the hearing panel or individuals who will be involved later in the appeal process. Although a due process not an ethical issue, a student or employee in a disciplinary hearing should be allowed to have counsel attend if the university has the assistance of counsel. See French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), appeal dismissed, 425 F.2d 182 (5th Cir. 1970), cert. denied, 400 U.S. 941 (1970).

2. Defense Counselor for Administrator (Grievance/Tenure Denial/Termination Hearing)

There is significant variation in how universities handle the provision of legal representation for

administrators in institutional grievance, tenure denial and termination proceedings. Some provide representation at termination hearings but not grievance hearings; others provide representation at every type hearing where the decision of an administrator is being challenged. Some permit the institution's legal counsel and opposing counsel to participate actively in the proceedings; others permit only an advisory role. Almost all institutions provide that legal counsel will be present on behalf of the university if the aggrieved employee or student is represented by counsel.

3. Multiple Roles in the Same Case

Especially at smaller institutions, the question frequently arises as to whether the attorney can perform more than one role in the same case--i.e., is it ethical to be the "lawyer for the situation"?

A lawyer must maintain independent professional judgment and decline to represent two or more clients who may have differing interests. Disciplinary Rule 5-105 prohibits a lawyer from representing multiple parties if his or her independent judgment will be adversely affected. However, government attorneys from the same attorneys general's office have been permitted to prosecute disciplinary actions and simultaneously give advice to the ultimate decision-maker. See Amoss v. University of Wash., 700 P.2d 350, 361 (Wash. Ct. App. 1985) (finding no impropriety or violation of appearance of fairness doctrine where two different attorneys fulfilled different functions, kept separate files and did not confer with each other; see also, Horowitz v. Colorado State Bd. of Med. Examiners, 716 P.2d 131, 134 (Colo. Ct. App. 1985) (finding no conflict or impropriety in two divisions of attorney general's office prosecuting charge and providing representation to Podiatry Board in disciplinary proceeding).

HYPOTHETICALS

(A) The Case of the Confused Center

The attorney for Sports U. and a member of the law faculty, who was not licensed to practice law, were in charge of responding to allegations of improper football recruiting made by the NCAA. In the course of interviewing Confused Center, a student-athlete who had allegedly been offered a large sum of money to attend the university, the attorney and faculty member both advised Confused that they "represented" Sports U., not Confused, and that the institution would employ an attorney for him if it appeared his eligibility might be affected by information coming from the investigation.

Confused said that he fully understood the role of both the attorney and the professor and then began to tell them how he had been offered a car and money to attend the school. He added that he was certainly glad he had people to talk with who could not repeat what he was telling since they were his "lawyer."

1. Did an attorney-client relationship exist between attorney and Confused? Between faculty member and Confused?

2. Were the revelations which Confused disclosed to the attorney and faculty member protected under the attorney/client privilege? What about the attorney's nearly verbatim notes on Confused's statements?

3. Does it matter that the faculty member is not licensed to practice law and is not part of the university attorney's office?

(B) The Perils of the Well-Meaning Counselor

Constance Counselor, legal counsel for State U., also taught a graduate class at the university. Several young women in her class complained to her that the Provost had sexually harassed them on several occasions. They had filed no formal complaint because of fear of retaliation. Although uncomfortable listening to complaints against a high level administrator, Constance did so believing that she could work through the problem to bring about a satisfactory resolution short of litigation.

Constance told the Provost of the accusations. He denied them all. Sexual harassment charges were eventually filed by one of the students against the Provost. The Hearing Panel asked Constance to attend the hearing and advise the panel on procedural matters. The Provost asked Constance to represent him at the hearing. There are no other attorneys in the legal office so Constance always gives advice to the President when matters such as this are eventually appealed to him.

What ethical issues exist here? What professional relationship, if any, does Constance have with the Provost, the President, the Hearing Panel? What relationship, if any, with the young women? If the Hearing Panel should find the Provost innocent of all charges and litigation subsequently takes place, who could Constance represent? What confidences told to Constance are protected by the attorney/client privilege?